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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-608

RELIANCE INSURANCE COMPANY,
Petitioner,

vs.

DeBOER CONSTRUCTION, INC., and
THE INSURANCE CENTER, INC.,
Respondents.

BRIEF OF RESPONDENT DeBOER CONSTRUCTION, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRIEF OF RESPONDENT DeBOER CONSTRUCTION, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondent, DeBoer Construction, Inc. (hereafter "DeBoer") respectfully prays that this Court deny the Petition for Writ of Certiorari filed herein by Reliance Insurance Company (hereafter "Reliance") seeking a review of the judgment of the United States Court of Appeals for the Tenth Circuit in *DeBoer Construction, Inc.* v. *Reliance Insurance Company and The Insurance Center, Inc.*, 540 F.2d 486 (10th Cir. 1976).

QUESTIONS PRESENTED

1. Do the issues of this case present sufficiently special and important reasons to grant the Petition?

2. Is a grant of the Petition for the sole purpose of certifying questions of law to the Supreme Court of the State of Oklahoma justified and timely?

3. Did the Court of Appeals properly apply the partial validity exception doctrine to the unique facts of this case?

4. Did the Court of Appeals properly determine that DeBoer was entitled to a judgment based upon the oral promise to execute a payment bond?

5. If the Petition is granted, is DeBoer entitled to have its judgment affirmed upon other grounds than those stated by the Court of Appeals?

STATEMENT OF FACTS

This litigation arose out of a fraudulent scheme perpetrated on DeBoer by Dennis Winfrey (hereafter "Winfrey") and Wayne Bruce (hereafter "Bruce"). Winfrey was a general agent and attorney-in-fact for Reliance and an Assistant Vice-President and Bond Department Manager of an Oklahoma City independent insurance agency, The Insurance Center, Inc. (hereafter "Insurance Center"). Bruce controlled Bruce Development Corp. (hereafter "Bruce Dev."), a carpentry subcontractor on two apartment projects, Seven Oaks and Pheasant Run. DeBoer was the general contractor for those projects. The Seven Oaks Apartment Project is located in Peoria, Illinois (hereafter "Seven Oaks"), and the Pheasant Run Apartment Project is located in Oklahoma City (hereafter "Pheasant Run"). Winfrey and Bruce conspired to defraud DeBoer through the issuance of performance and payment bonds guaranteeing the performance of Bruce Dev. on Seven Oaks and Pheasant Run. Without the bonds Bruce Dev. would never have been granted the subcontracts on either project. When Bruce Dev. breached its subcontracts with DeBoer, and Reliance refused to honor the bonds, litigation ensued.

The original trial Record consisted of over 50 volumes of evidence and pleadings, including 4,000 pages of depositions and trial transcripts. It was thereafter reduced to a four-volume Appendix to the Briefs containing 882 pages of pleadings, testimony and exhibits. This STATEMENT OF FACTS generally follows the sequence of the "Basic Facts" appearing at pages 6-11 of the Petition (hereafter "Pet."). This is done to enable this Court to more fully understand the facts of this case and the issues involved and because Reliance has frequently either misstated the evidence or failed to include significant facts. (For example, Jerry Elkins' name does not appear anywhere in the Petition. Elkins was a general agent and attorney-in-fact for Reliance and was Winfrey's assistant in Insurance Center's Bond Department. Elkins was involved in many significant events of the fraud, including delivery of bonds and *personally drafting* the Seven Oaks performance bond out of which this litigation arose.)

Reliance says it issued a power of attorney to Winfrey at Insurance Center's request " . . . believing Winfrey to be competent and honest, . . ." (Pet. p. 6). The Court of Appeals agreed with the trial court's finding that Reliance was negligent in furnishing a power of attorney to Winfrey and in supervising him; and, that Winfrey had neither the experience nor training customary for one in his position.[1] Winfrey was first employed by Insurance Center in June, 1967, as a trainee for property and casualty insurance (not surety). In July, 1968, he received his power of attorney from Reliance and three months later became Bond Department Manager of Insurance Center. Winfrey had no experience in the bond business prior to June, 1967. Bill Stafford (hereafter "Stafford") was the head of Reliance's

1. *DeBoer Const., Inc.* v. *Reliance Ins. Co.*, 540 F.2d 486 at 491-2 (10th Cir. 1976).

Dallas regional office for bond underwriting and sales. Stafford recommended that Winfrey be granted a power of attorney after meeting him once and obtaining no information concerning his experience. Stafford *could not recall* how he obtained the information he put into his formal written Recommendation. The Recommendation recited that Winfrey had worked with Insurance Center for three years despite Stafford's own records showing that Winfrey had only been a licensed insurance agent for approximately three months. The Recommendation stated that Winfrey had five years experience in handling bonds prior to his association with Insurance Center, whereas Winfrey's Application for his three-month-old license, which Reliance approved, disclosed no bond experience. Insurance Center denied furnishing any of the above information to Stafford.

Stafford admitted that he wanted to get persons to increase bond sales for Reliance in Oklahoma and felt Winfrey could promote bond business. Stafford, Robert Bedworth (Reliance's head of Construction Bond Underwriting), and an expert witness called by Reliance all admitted that sales and customer service were the primary purposes for powers of attorney. Bedworth admitted that insurance companies use powers of attorney as competitive devices to promote sales, and the trial court found that Reliance engaged in such practice. Stafford likened a power of attorney to a *signed blank check.*

As Bond Department Manager, Winfrey had control of all Reliance bonds issued through Insurance Center. Six other agents at Insurance Center, including Winfrey's secretary, held unlimited powers of attorney from Reliance. When Winfrey received his power of attorney it was the only one in the agency that was limited. More attorneys-in-fact were appointed by Reliance at Insurance Center

than were necessary for the surety business in Oklahoma City. Winfrey used his secretary's power of attorney from Reliance on other fraudulent bonds. Winfrey never wrote a reported bond for Reliance for the entire two years he held the power of attorney. Stafford, with full knowledge of Winfrey's position, made no attempt to supervise his conduct.

Reliance claims (Pet. p. 6) that written Instructions prohibited Winfrey from executing any bond without the consent of Reliance. These Instructions, of course, were never made available to any of Reliance's bond clients. The Instructions did not limit the consent to only Reliance but also included the person who was Bond Department Manager when Winfrey got his power of attorney.

The Agency Agreement between Insurance Center and Reliance provided that Reliance retained its right to control all bond forms, powers of attorney and seals. Reliance failed to ever exercise any control over its forms, powers and seals. Employees of Insurance Center exceeded their Instructions from Reliance three times within seven years preceding Winfrey's employment, but Reliance did nothing to reduce the limits of any outstanding powers of attorney or to require any training for any agents. Reliance admitted that it failed to use a control system to account for bond supplies because the cost of such control system would exceed the risk of loss *to Reliance.*

Reliance claims that efforts were made to find a bonding company for Bruce Dev., but that such efforts did not include Reliance (Pet. pp. 6-7). A file concerning Bruce Dev. was found among the records of Insurance Center. Reliance never mentions, however, that Winfrey discussed bonds for Bruce Dev. with Stafford, took him to Pheasant Run and agreed to send him information concerning Bruce Dev. Stafford *could not recall* receiving such information.

Reliance claims Winfrey delivered forms to Bruce and his wife who in turn filled out the forms and delivered them to the proposed obligees (Pet. p. 7). In fact, the Pheasant Run bonds, on which Reliance admitted liability, were delivered to DeBoer by Winfrey and Elkins. The Seven Oaks performance bond was filled out by Elkins and delivered to DeBoer by Winfrey and Bruce. Just three days prior to Elkins' filling out the Seven Oaks performance bond, Insurance Center, with Reliance's approval, submitted an Application for his appointment as a property, casualty and surety agent of Reliance. This appointment was approved and a power of attorney issued to Elkins long before discovery of the fraud. Elkins, naturally, claimed that he knew nothing of the fraud and that the power of attorney and Seven Oaks performance bond he filled out were just fine print that he did not understand. Elkins and Winfrey appeared as representatives of Reliance at numerous meetings with DeBoer and Bruce during construction of Pheasant Run and Seven Oaks.

Reliance claims that Winfrey never collected any premiums for the bonds (Pet. p. 7). Winfrey did collect premiums on both projects, after submitting invoices on old Insurance Center invoice forms, and kept them without DeBoer's knowledge.[2]

DeBoer's vice-president did not read the language of the power of attorney attached to either the Pheasant Run or Seven Oaks bonds to determine if it complied with the face amount of the bonds. He checked to see that a power of attorney was attached and assumed it was valid. At the time of the fraud, DeBoer was a five-man operation. The vice-president involved was a high school graduate, in his mid-twenties, and whose experience with bonds had been

2. *Id.* at 489-490.

limited to picking up bond forms for his father-in-law. He was in reality a construction superintendent.

During a space of 11 months, Winfrey issued at least 12 fraudulent bonds, including DeBoer's. These bonds involved five different projects, four owners or contractors, had cumulative penalties of over $3,500,000, and generated nearly $15,000 in premiums. Some of these other bonds contained no power of attorney at all and some contained the power of attorney and forged signature of Winfrey's secretary, who never met the other obligee involved. Reliance admitted liability on all bonds except Seven Oaks. In connection with these other bonds, the fraud went undetected by a Peoria, Illinois, bank which was the construction lender on Seven Oaks, the title insurance company on Seven Oaks, the vice-president of an Oklahoma City bank which was the construction lender on Pheasant Run and who personally felt Bruce was dishonest, architects who received bonds with Winfrey's secretary's power of attorney and forged signature, a large multi-state construction company from Tennessee who received a number of different bonds from Bruce through different companies, and an undetermined number of other persons who were defrauded by Winfrey. Reliance claims it is still unable to account for the number of powers of attorney and bonds which were used by Winfrey.

Reliance claims that had DeBoer's construction superintendent read the power of attorney he would have learned that Winfrey had no authority. Utilizing typical insurance contract succinctness and brevity, the sentence in the power of attorney which restricts Winfrey is comprised of over 130 words and has in excess of 20 punctuation marks. When asked to explain the significance of the power of attorney after discovery of the fraud, DeBoer's employees had various ideas as to what it meant. One be-

lieved (prophetically) that DeBoer had a $500,000 bond and another believed that DeBoer had a bond for $925,000 plus $500,000. These facts, and issues raised from them, were not considered by the Court of Appeals.[3]

Reliance claims that oral statements of Winfrey were the only representations to DeBoer concerning Winfrey's authority. This ignores events over a period of months, before and after Elkins' participation, including correspondence with the President of Insurance Center concerning insurance on the projects, trips to DeBoer's Wichita, Kansas, offices and to Pheasant Run by Winfrey and Elkins, a visit to Insurance Center's offices by a DeBoer employee, and correspondence from Winfrey—all of which confirmed that Winfrey was who he said he was, a general surety agent for Reliance and Assistant Vice-President and Bond Department Manager for the largest insurance agency in Oklahoma. Reliance's claim also ignores the fact that all bond forms, seals and powers of attorney utilized in this fraud were owned by Reliance, created by Reliance, and furnished to Winfrey by Reliance.

Reliance curiously claims that DeBoer had notice of other facts which should have led to discovery of the fraud (Pet. pp. 8-9). These other facts came from the vice-president of the Oklahoma City bank that financed the construction of Pheasant Run. He testified at trial as to his experience in the construction industry and his distrust of Bruce. When shown the Pheasant Run performance bond, he called Insurance Center and spoke with its Bond Department Manager, Winfrey, who assured him as to Bruce Dev.'s bonding capability. Knowing the good reputation of Insurance Center and Reliance, he made no further inquiry as to Bruce's financial abilities. He

3. *Id.* at 496.

never again questioned Bruce's financial problems with DeBoer.

Reliance claims that immediately upon discovery of the fraud it denied liability to DeBoer on the Seven Oaks bonds based upon the insufficiency of the power of attorney (Pet. pp. 9-10). In fact, Reliance concealed its decision on liability until it had persuaded DeBoer to give it control of Bruce Dev.'s contract on Pheasant Run and $30,000 in retainage money. This was a deliberate misrepresentation for the benefit of Reliance. Reliance's conduct was thoroughly condemnable.[4]

ARGUMENT

The Petition Does Not Present Sufficiently Special or Important Reasons to Justify the Granting of a Writ of Certiorari

A Writ of Certiorari is granted as a matter of discretion based upon the significance of the questions involved. The only basis upon which a Writ of Certiorari could conceivably be granted is set forth in Rule 19, United States Supreme Court Rules, Subsection 1(b):

> Where a court of appeals . . . has decided an important state . . . question in a way in conflict with applicable state . . . law . . .

Reliance claims (Pet. p. 11) that the Court of Appeals decided this case contrary to statutory and decisional law of Oklahoma. Reliance never cites any statute or decision from Oklahoma which is controlling. Considering the partial validity question, the Court of Appeals said:

4. *Id.* at 492.

> This is a matter of first impression in Oklahoma, and we are inclined to give great deference to the opinion of the resident federal district judge concerning that state's law. . . . In this case we have not been cited to any decision in point.[5]

Considering the oral contract for a payment bond question, the Court of Appeals said:

> Reliance has failed to show any basis upon which we could conclude the trial court was erroneous in holding there had been sufficient performance by DeBoer to take the contract out of the Statute.
>
> . . . Reliance offers no explanation and (sic) citation of authority.
>
> . . . Considering the apparent lack of controlling authority, we believe we should follow our established policy of deferring to the judgment of the resident district judge. (citations omitted)[6]

In its Petition, Reliance analogizes to other Oklahoma decisions and statutes, reasoning therefrom as to what it believes should be the law of Oklahoma. In this Brief, DeBoer follows the same pattern of legal analysis, though arriving at the same conclusion reached by the Court of Appeals. The well-reasoned opinion of the Court of Appeals and the decision of the resident federal district judge both reached a conclusion that was not inconsistent with existing Oklahoma law. This was their responsibility under *Erie*.[7]

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5. *Id.* at 492-3.

6. *Id.* at 494-5; accord: *Bishop* v. *Woods*, ... U.S. ....., 96 S.Ct. 2074 (1976).

7. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938).

This Court has held that questions of local law should be determined by the judges of the local courts and that only in exceptional cases will this Court review such a determination.[8]

The Petition does not state important legal questions for the surety industry or for the state of Oklahoma (Pet. pp. 11-12). Reliance claims the entire marketing system of the commercial surety industry and all persons utilizing powers of attorney will be radically affected by this decision. This claim deliberately ignores the plain language of the opinion. The Court of Appeals said that a power of attorney has long been considered an effective means of bringing limitations on authority to a third person's attention; and, any holding of the trial court making powers of attorney ineffective as limitations on bonding agents was not proper or desirable.[9] The Court of Appeals clearly restricted its ruling on the question of partial validity to the unique facts of this case:

> "We are not saying the rule of partial validity should apply in all cases involving fraudulent contracts by an agent where the only power exceeded is the limitation on the amount[10]."

If the opinion of the Court of Appeals has the effect upon Reliance of modifying its practices of selecting and supervising its agents so that greater concern for the public is shown, then that would surely be a salutary result. Reliance cannot seriously urge that it will be detrimental to anyone's business to forego furnishing powers of attor-

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8. Though clearly distinguishable, *see*, *Busby* v. *Electric Utilities Employees Union*, 323 U.S. 72 (1944); *and see*, *Cort* v. *Ash*, 422 U.S. 66 (1975).

9. 540 F.2d 486 at 491 n.2.

10. *Id.* at 494.

ney to persons clearly not qualified to receive them. If the questions herein are important to the surety industry, then certainly that industry would have filed briefs *amicus curiae*.

A Writ of Certiorari Should Not Be Granted for the Sole Purpose of Certifying Questions of Law to the Supreme Court of the State of Oklahoma

Reliance asserts that this Court should grant a Writ of Certiorari solely to certify the *undetermined questions of Oklahoma law* to the Supreme Court of the State of Oklahoma for its determination pursuant to the Uniform Certification of Questions of Law Act.[11] This assertion is obviously inconsistent with Reliance's claim that the Court of Appeals misapplied *existing Oklahoma law*.

This Act is to be utilized only where it appears that there is no controlling precedent in the decisions of the Supreme Court of the State of Oklahoma.[12] When Reliance contends this Act is applicable, it concedes there was no misapplication of Oklahoma law by the Court of Appeals. Having conceded this, there is no basis for granting a Writ of Certiorari.

Prior to the Petition, Reliance never sought a certification of questions of law to the Oklahoma Supreme Court. Now, as a last-ditch effort, Reliance seeks to change forums in the hope that the Oklahoma Supreme Court will give it the result it has been unable to obtain from three adverse adjudications in the federal courts.

Reliance is guilty of laches by never previously seeking certification of questions of law. This litigation com-

11. 20 Okla. Stat. § 1601, *et seq.* [Pet. Appendix D, pp. xxii-xxiv.]

12. *Id.* § 1602.

menced in 1971. The Uniform Certification of Questions of Law Act was effective in Oklahoma on July 1, 1973. The judgment in this case was rendered in May, 1974, though trial took place in March, 1974. Argument and submission of this case to the Court of Appeals was on November 13, 1975. Reliance's Petition for Rehearing and Suggestion That the Court Conduct a Rehearing En Banc were filed in September, 1976. Reliance never raised the certification question, though it had an apparent right to do so upon motion.[13] Research fails to disclose any decisions considering this or similar acts which have discussed the question of laches.[14] It is, however, well established in this Court that questions not raised at the trial court or in the Court of Appeals will not be considered by this Court.[15] If any questions would be certified to the Supreme Court of the State of Oklahoma, the threshold questions certified would have to be whether or not Reliance is guilty of laches and whether, under that circumstance, the Oklahoma Supreme Court should exercise its discretion, to answer any certified questions.[16]

The reasonable use of the Act requires that it be applied with restraint, only in those instances where substantial and significant questions need be determined, and only then if such does not result in unnecessary delay

13. *Id.* § 1603.

14. See the concurring opinion of Mr. Justice Rehnquist in *Lehman Brothers* v. *Schein*, 416 U.S. 386 (1974), which touches upon the question, though it was not considered in the Court's opinion.

15. *Cort* v. *Ash*, 422 U.S. 66 (1975); *Adickes* v. *S. H. Kress and Co.*, 398 U.S. 144 (1970).

16. 20 Okla. § 1602.

of the litigation.[17] The Act also requires that all relevant facts to fully show the nature of the controversy in which the questions arose be furnished to the Oklahoma Supreme Court with the certified questions.[18] Given the facts and Record of this case, this would be extremely difficult, if not impossible. The application of the Act would result in a retrial of the entire case to the Oklahoma Supreme Court. Certified questions from the United States Court of Appeals to this Court, sent under analogous law, have been refused when the certification in effect would be to decide the case and not to answer questions of law.[19]

The Court of Appeals Properly Applied the Partial Validity Exception Doctrine to the Unique Facts of This Case

Reliance claims the Court of Appeals decision concerning the partial validity exception doctrine was contrary to Oklahoma law. The initial three pages of Reliance's argument on this point (Pet. pp. 13-15) states why Reliance believes the Court of Appeals was correct in holding that Winfrey did not have apparent authority to execute the $925,000 Seven Oaks performance bond. Reliance has conceded that Winfrey had apparent authority to execute bonds up to $500,000 (Pet. p. 21), so its apparent authority argument is not relevant to the stated issue. If Reliance

17. *England* v. *Louisiana State Bd. of Med. Exam.*, 375 U.S. 411 (1964); *Clay* v. *Sun Insurance Office Ltd.*, 363 U.S. 207 (1960); *Trail Builders Supply Company* v. *Reagan*, 409 F.2d 1059 (5th Cir. 1969); *Motor Vehicle Casualty Co.* v. *Atlantic National Ins. Co.*, 374 F.2d 601 (5th Cir. 1967); *Greer* v. *Associated Indemnity Corp.*, 371 F.2d 29 (5th Cir. 1967); *Hamilton* v. *Maryland Casualty Company*, 368 F.2d 768 (5th Cir. 1966); *Green* v. *American Tobacco Company*, 304 F.2d 70 (5th Cir. 1962); *In Re Elliott*, 446 P.2d 347 (Wash. 1968).

18. 20 Okla. Stat. §§ 1604 & 1605.

19. *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U.S. 563 (1939); *Felsenheld* v. *United States*, 186 U.S. 126 (1902).

is correct as to its version of apparent authority as the basis for partial validity, then there could never be a partial validity exception.

Reliance claims that when dealing with an attorney-in-fact, Oklahoma Statutory law requires an individual to ascertain the attorney's authority (Pet. p. 14). The statute referenced, 25 Okla. Stat. § 13 is misrepresented by Reliance. The statute says nothing with regard to agents or attorneys-in-fact. At best, this argument goes to the non-issue of apparent authority.

Reliance claims that two other cases with almost identical facts have denied the obligee (DeBoer) any relief (Pet. p. 15, n.9). These two cases are supposed to support Reliance's unstated contention that there can never be a partial validity exception. The two cases cited by Reliance have been its only authorities throughout this litigation for the proposition that DeBoer should not be able to recover anything from Reliance. The first, *Stovall* v. *Commonwealth*, 4 S.E. 379 (Va. 1887), dealt with a special agent and not a general agent as was Winfrey in this case. *Stovall, supra*, is not even the law of Virginia anymore as a more recent case has arrived at the same result as the Court of Appeals herein by severing the excess portion of a bond.[20] The second, *Dugan* v. *Champion Coal & Towboat Co.*, 49 S.W. 958 (Ky. App. 1899), is even further from the point. *Dugan* dealt with a special agent who was authorized to do a one-time particular act. The *Dugan* opinion never even considered the question of partial validity.

Turning, finally, to the question of the partial validity exception doctrine, Reliance claims the Court of Appeals is wrong in stating that this is a question of first impres-

20. *Yost* v. *Ramey*, 48 S.E. 862 (Va. 1904).

sion in Oklahoma (Pet. p. 15, n.11). Reliance cites no Oklahoma statutes or cases in support of this claim because there are none. Reliance's claim that this question has been considered by the Oklahoma Supreme Court in factually similar cases is misleading and inaccurate. The only Oklahoma authorities Reliance cites are a statute concerning powers of attorney for real property which is consistent with the Court of Appeals decision[21] and a 1940 decision of the Supreme Court of Oklahoma.[22] The significance of the 1940 decision is best demonstrated by the fact that Reliance did not cite it to the Court of Appeals in 92 pages of Briefs filed with that Court and chooses not to discuss its obviously inapplicable and dissimilar facts with this Court.

The Court of Appeals correctly held that the partial validity exception doctrine is recognized by the American Law Institute in Restatement (Second) of Agency § 164(2) (1958)[23] and that it is accepted and supported by numerous authorities, citing *Walker* v. *Peake*, 153 S.C. 257, 150 S.E. 756 (1929), and *Lachmiller* v. *Lachmiller Engineering Corporation*, 144 Cal. App. 2d 533, 301 P.2d 288 (1956).[24] *Lachmiller* turned upon a specific California statute which codifies the common law as expressed by *Walker*, the Court of Appeals herein and 3 Am. Jur. 2d *Agency* § 269, p. 633.

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21. 60 Okla. Stat. § 236.

22. *Home Owners Loan Corp.* v. *Thornburgh*, 106 P.2d 511 (Okla. 1940).

23. 540 F.2d 486 at 493.

24. Accord: *Pogue* v. *Bank of Lake Village*, 464 S.W.2d 49 (Ark. 1971). *See also, Guaranty Trust Co. of New York* v. *Koehler*, 195 F. 669 (C.C.A. 8th Cir. 1912); *Wynn* v. *Hoffman*, 82 So. 32 (Ala. 1919); *Drumright* v. *Philpot*, 60 Am. Dec. 738 (Ga. 1854); *Reed* v. *Seymour*, 24 Minn. 273 (1877); *Wilson* v. *Beardsley*, 30 N.W. 529 (Neb. 1886); *Yost* v. *Ramey*, 48 S.E. 862 (Va. 1904); *Jesup* v. *City Bank of Racine*, 5 N.W. 45 (Wis. 1861).

Oklahoma has two statutes which are consistent with the Court of Appeals reasoning. 15 Okla. Stat. § 105 relates to contracts generally and permits severability when at least one part of a contract is lawful and the balance unlawful. 60 Okla. Stat. § 236 (1971), deals with powers of attorney and the disposition of real property and specifically provides that a disposition is valid to the extent of the power and not wholly void. This latter statute was cited by the Court of Appeals in its analysis.[25] Referring to this same statute, Reliance states: "Had the Oklahoma Legislature intended the rule to apply to other situations it would have adopted similar statutes. It didn't." (Pet. p. 17, n.13). Reliance apparently contends that Oklahoma's adoption of a statute endorsing partial validity in one area of law expresses its intent to exclude it in all other areas. No authority is cited to support this curious contention.

Reliance claims that DeBoer did not manifest a willingness to accept the authorized portion of the bond since it did not contact Reliance in Philadelphia until four and one-half months after the bond was issued (Pet. p. 20). DeBoer did not contact Reliance in Philadelphia until Bruce Dev. defaulted on its contract in July, 1970. Reliance denied any liability in August, 1970, before Seven Oaks construction was even one-half completed. When DeBoer realized it could not complete Bruce Dev.'s contract for $925,000, DeBoer wrote a demand letter to Reliance. Reliance never answered that letter. Reliance now claims DeBoer never manifested its willingness to accept a bond with a penal amount of $500,000, or less. When Reliance refused to even respond to a demand letter, DeBoer filed suit. In its initial Complaint, in 1971, DeBoer set forth its willingness to accept a bond of $500,000, as an alterna-

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25. 540 F.2d 486 at 493.

tive theory of recovery, and has continued to assert that position throughout the litigation.

Restatement (Second) of Agency § 164(2) declines to state a rule where the agent is defrauding the principal as well as the third party. Stating this, the Court of Appeals then turned to the Comments and Notes accompanying the Restatement section to discern what law should reasonably be applied, noted the doctrine is intended to be equitable in nature, and concluded under the facts of this case:

> . . . One purpose of this rule is to prevent fraud by the agent. We do not believe, however, that the rule permitting partial validity is necessarily at odds with the rule designed to prevent fraud. Holding the principal liable to the extent he has given authority would not diminish the incentive of those dealing with an agent to ascertain his authority. They would still be subject to loss when the agent fraudulently exceeds his authority.

We see no inherent justice in holding the principal for the entire loss when his agent commits fraud within his authority and in allowing him to escape liability entirely when his agent exceeds his authority. The rule of partial validity could have a salutary effect in preventing the type of conduct involved in this case. *Reliance set the dollar limit on Winfrey's authority at a level it felt was an acceptable risk, considering the potential loss compared to the chances its agent would be unfaithful.* Thinking itself adequately protected from financial loss, *Reliance ignored its duty to supervise its agent and protect the public from loss should Winfrey execute a fraudulent contract in excess of his authority. Dividing the responsibility in the event of loss could encourage both parties to*

exercise greater prudence than they did in this case. 540 F.2d 486, 493 (Emphasis supplied).

The absence of "inherent justice" is best demonstrated by Reliance's claim made to the trial court that if one of its agents affixed a $100,000 power of attorney to a $101,000 performance bond, Reliance would have the right to avoid any liability at its option. Reliance creates powers of attorney to sell bonds and seeks a rule of law which gives it a fielder's choice when one of its poorly selected and ill supervised agents commits fraud. Reliance set the dollar limit at an acceptable risk level to it when issuing the so-called blank check to Winfrey. Their regional manager, Stafford, explained that these blank checks were limited sometimes to keep down Reliance's exposure. He and other Reliance witnesses explained that they did not spend the money to supervise their agents because they felt the risk of loss was less than the cost of supervision. Having made that conscious decision to accept the "potential loss compared to the chances its agents would be unfaithful,"[26] Reliance should now be required to accept the loss.

The Court of Appeals Properly Determined That Respondent Was Entitled to Judgment Based Upon the Oral Promise to Execute a Payment Bond

The threshold question to this issue is whether or not the oral promise to execute a payment bond falls within the Statute of Frauds. The Court of Appeals assumed, without deciding, that the promise did fall within the Statute and excepted the promise from the Statute based upon DeBoer's performance.[27] Though DeBoer con-

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26. *Id.*

27. *Id.* at 494.

tends the promise is not within the Statute, extensively briefing this contention in the Court of Appeals, it serves no purpose to recite those authorities herein. The only issue here is whether the Court of Appeals correctly excepted the promise from the Statute. Reliance presented no basis to the Court of Appeals to conclude the trial court was erroneous in holding that there had been sufficient performance. Reliance claimed that there was no full or partial performance, but offered no explanation as to why and cited no authorities.[28]

Reliance concedes that in Oklahoma a "fully executed" promise to answer for the debt, default or miscarriage of another is not invalid (Pet. p. 25). DeBoer paid the full premium for both bonds, and Reliance has never suggested anything that DeBoer did not do. Authorities generally, and from Oklahoma, state that partial performance will remove the promise involved from the Statute of Frauds.[29] The only performance which DeBoer could accomplish for this particular contract was to pay the premium, which it did. The only performance not accomplished by anyone was Winfrey's failure to deliver the form to DeBoer. If that is the type of performance Reliance claims would be necessary to except the promise from the Statute, Reliance's claim is ridiculous because the promise would never be under the Statute in the first place.

Reliance's claim that there was no assurance as to what company would provide the bond is a distortion of surety industry practices and the uncontradicted evi-

28. *Id.*

29. *Id.* at 494, 495 and authorities cited therein with particular note to nn.6&7; and *see, Gibson* v. *Dunham*, 346 P.2d 327, 328 (Okla. 1959); *Lindley* v. *Kelly*, 147 P. 1015 (Okla. 1914); *Ganas* v. *Tselos*, 157 Okla. 107, 11 P.2d 751 (Okla. 1932).

dence. A payment bond is a necessary ancillary to a performance bond. The premium paid for a performance bond automatically includes the furnishing of a payment bond. The coverages in fact are duplicitous since the payment bond is a guarantee for suppliers and subcontractors and naturally covers the same dollar costs involved in the performance of the underlying contract. Payment bonds are normally issued with performance bonds and in the same company as the performance bond. Reliance never presented a single instance where a performance bond was issued by one surety company and a payment bond by another.

If Certiorari Is Granted, This Respondent Is Entitled to Have Its Judgment Affirmed Upon Grounds Not Relied Upon by the Court of Appeals

The Petition correctly states that the trial court ruled in DeBoer's favor on a number of legal theories. Some of these were considered by the Court of Appeals. If this Court should grant a Writ of Certiorari and either of the two principal issues are decided adversely to DeBoer by this Court, or by the Oklahoma Supreme Court upon certification, then these other legal theories will again be significant. A holding that the partial validity exception doctrine is inapplicable requires DeBoer to look to a different legal theory for recovery. If the judgment upon the payment bond is set aside, then DeBoer's total damages (the amount of the judgment under the performance bond plus the amount under the payment bond) will exceed $500,000, and again DeBoer is required to look to a different legal theory for full recovery.

No purpose is served by presenting detailed factual and legal analysis supporting DeBoer's alternative theories which are listed here simply to acquaint the Court with

the fact that some or all of these theories may be presented to the Court.

Theories which the Court of Appeals considered and decided adversely to DeBoer's position include the questions of negligence and/or constructive notice regarding DeBoer's employees, whether Winfrey had apparent authority to issue the bonds, whether the doctrine of estoppel should preclude Reliance from asserting the lack of apparent authority, and whether Reliance was responsible under agency law for the fraud of Winfrey. The Court of Appeals considered, but only summarily, the additional theories of waiver and ratification. Some, but not all, of the facts supporting these theories have been presented in other issues herein.

Those theories decided in DeBoer's favor by the trial court and not ruled upon by the Court of Appeals include the questions of gross negligence of Reliance, whether DeBoer's contributory negligence is a defense to that gross negligence, whether Winfrey had actual authority to issue the bonds based upon Reliance's relationship with Insurance Center, whether Reliance had a contractual duty to supervise Winfrey pursuant to regulations and applications of the Insurance Commissioner of the State of Oklahoma, whether an oral contract for a performance bond was enforceable, and whether the performance bond and power of attorney should be reformed to accurately reflect the agreement of the parties. Again, some, but not all, of the facts supporting these theories have been presented in other issues herein.

CONCLUSION

Based upon the reasons stated above, Respondent respectfully prays that this Court deny the Petition so that Respondent can finally collect its damages which were incurred nearly seven years ago.

Respectfully submitted,

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